IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1741

STATE OF ALABAMA,

Petitioner

versus

RICHARD ZUCK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITER STATES COURT OF APPEALS FOR THE FIFTH COURT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITER STATES COURT OF APPEALS FOR THE FIFTH COURT

The petitioner, State of Alabama, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding January 24, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The petitioner's application for rehearing was denied without opinion. The memorandum opinion of the District Court for the Northern District of Alabama appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 24, 1979. A timely petition for

rehearing en banc was denied on February 20, 1979, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

Whether a finding that trial counsel for a defendant in a criminal trial who also represents the prosecutor in some unrelated civil litigation creates a conflict of interest which renders the criminal trial fundamentally unfair is sufficiently important for this Honorable Court to review.

STATEMENT OF THE CASE

On January 11, 1974, an indictment for the alleged offense of murder in the first degree was returned by the Grand Jury of Jefferson County against petitioner.

The cause proceeded to trial on June 10, 1974, before the Honorable Charles R. Crowder, Judge of the Circuit Court of the Tenth Judicial Circuit of Alabama, Jefferson County, Alabama. On June 14, 1974, the jury returned a verdict finding the petitioner guilty of murder in the second degree and fixed punishment at forty (40) years imprisonment in the penal system of the State of Alabama; and on the same date, petitioner gave notice of appeal. The conviction was affirmed on appeal, *Zuck v. State*, 57 Ala. App. 15, 325 So. 2d 531 (1975), cert. den. 295 Ala. 430, 325 So. 2d 539 (1975).

On May 29, 1975, petitioner filed a petition for Writ of Error Coram Nobis, alleging, among other things, that at the time of the trial during the week of June 10, 1974, petitioner's attorneys of record, the law firm of Beddow, Embry

and Beddow, were also representing in a separate civil proceeding Mr. Larry Waites, the prosecutor in the cause of June 10, 1974. Petitioner further alleged that such simultaneous representation by his attorneys of himself and the prosecutor amounted to a conflict of interest which deprived him of his constitutional rights under the Fourteenth Amendment to the United States Constitution. Petitioner furher alleged that he did not learn of the said conflict of interest until after the conviction by the jury on June 14, 1974.

The Petition for Writ of Error Coram Nobis was set for hearing by the Honorable Charles Crowder, Judge Presiding, on June 9, 1975. On June 10, 1975, Judge Crowder entered an order denying the Writ of Error Coram Nobis, and on the same date, petitioner filed notice of Appeal.

The Court of Criminal Appeals affirmed the decision of the lower court on October 26, 1976, and denied petitioner's application for rehearing on November 16, 1976.

Petitioner filed Petition for Writ of Habeas Corpus under Title 28, Section 2254 U.S.C. on February 11, 1977. The Writ was denied on April 13, 1978.

On January 24, 1979, the United States Court of Appeals, Fifth Circuit issued an opinion in this cause reversing the judgment of the district court and remanded the case for action consistent with its opinion.

Application for rehearing en banc was made and denied without opinion on February 20, 1979.

REASONS FOR GRANTING WRIT

It is the position of the State of Alabama that the opinion

issued by the Fifth Circuit Court of Appeals on January 24, 1979, in the cause raises questions of exceptional importance which require consideration by certiorari review.

Although the long range effect of the opinion below remains to be determined it is clear that the practice of law is substantially affected by this opinion. It seems evident that those who are employed in district attorneys' offices throughout this circuit have had their ability to hire counsel for their personal legal needs severely restricted.

This is the obvious result from the holding in this case. An example of the problem which a prosecutor may face would be helpful in understanding the state's position on this subject.

It is conceivable that a district attorney might seek legal help in some area and be unable to hire his preferred choice of counsel because that counsel participated in some amount of criminal defense work. It is further conceivable that in some localities every lawyer in that particular area could do criminal defense work from time to time. In such a locality a district attorney or his assistants would have to go out of their local circuit to hire counsel for even the simplist of legal aid. Even then an attorney might be reluctant to perform such services for a prosecutor in fear of losing some lucrative criminal case in the future. Such a reluctance would be justified under the decision at bar since an attorney could probably be denied representation of criminal defendants because he had at some time previous represented a district attorney. It is of little significance that a defendant "may" waive the conflict since an attorney has no way of knowing such a fact at the time his services are sought by a prosecutor.

Neither is it clear how this present opinion will be applied. Does the holding of this opinion affect all those who are related to prosecution work. That is, does it apply to all those employees who work in a district attorney's office, whether or not they try cases. It is conceivable to argue as a defendant that there is a conflict of your attorney's interest since your attorney does or has in the recent past represented someone connected with prosecution in some unrelated legal matter. The same or a similar argument could be made under this holding for cases on appeal. Would an attorney for a defendant-appellant have to withdraw his representation of that defendant if he discovered that the appeal had been assigned to a state's attorney who he had done or was presently doing legal work for.

The complex and seemingly almost endless problems which could arise as a result of this decision are apparent on its face. There is also more here than simply a problem of a district attorney being able to employ competent legal counsel of his own choosing.

The substantial and real effect of this opinion is that it not only severely limits a prosecutor's choice but additionally it serves as a barrier to the practice of law throughout the Fifth Circuit.

This decision and the substantial liberalness contained therein in stretching the principle of conflict of interest has the effect of demeaning the legal profession. It unquestionably takes from an attorney any use of his ability to make a rational decision on the question of where his interest lies. This decision quite obviously takes part of the professionalism out of the art of legal practice.

It is important to note here that the opinion in this case *(Zuck v. State of Alabama,* 78-2095, January 24, 1979, contained in appendix at page 2385) makes it clear that it makes no difference whether the alleged conflict actually prejudices the defendant's rights at trial. So it is conceivable that in a circumstance as was had in the case at bar a defendant might receive the very best legal representation in the country. That representation might be such that enable him under the circumstances to obtain the maximum benefit from his legal representation. It might be shown that trial counsel and the trial judge made no error whatsoever and that the defendant was not prejudiced in any way by any action at trial yet the appellant would be entitled to a new trial on demand and on a showing that his defense counsel in some totally unrelated matter represented the prosecutor.

Such a precedent as would be established by allowing this present decision to stand is one of exceptional importance to prosecutors, the legal profession in general, and society as a whole. The Constitution of the United States guarantees a right to a fair and impartial trial. However, there are certain limits on those constitutional protections. Clearly, a defendant has a right to a fair trial. But to say that he may obtain a new trial absent any prejudice in the first trial is to afford him a second chance merely on demand.

Of course, a contra argument might be made to this since there exists an actual conflict of interest there is prejudice inherrent to the trial situation. But it seems certainly uncharacteristic of criminal safeguards to say that where one's counsel has done legal work for the prosecutor then that person is inherrently prejudiced. More is necessary in such a situation than a non-viable, arbitrary standard which requires reversal without any discussion or in-

vestigation of whether the rights of the defendant were adversely affected.

The decision of the Fifth Circuit Court of Appeals in *Castillo v. Estelle,* 504 F.2d 1243 (1974) is obviously distinguishable from the case at bar. In *Castillo,* supra, there was actual prejudice pointed out by the appellant. Here there has never been any pretense or suggestion of any prejudice.

The finding that the obviously distant legal relationship between the prosecutor and defense attorneys is a per se conflict of interest which necessitates a new trial without regard to injury to the defendant is at the very least shocking. It is one of grave public interest and concern.

In summary and review, it is the state's position in this petition that the decision below is of unusually exceptional importance for several reasons.

First, the decision has significant policy ramifications which substantially diminish the prosecutor's freedom to hire counsel of choice.

Secondly, it is a matter of exceptional importance that a defendant may demand a new trial without any regard to whether his rights were adversely affected.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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STATE OF ALABAMA,

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama Montgomery County

I, the undersigned, Assistant Attorney General of Alabama, 64 North Union, Montgomery, Alabama 36130, hereby certify that I have deposited for service three (3) printed copies of a Petition for a Writ of Certitorari to the United States Court of Appeals for the Fifth Circuit to the Honorable Hubert L. Taylor, 827 Chestnut Street, Gadsden, Alabama 35901, and forty printed copies to the Clerk of the Supreme Court of the United States.

This the 18th day of May, 1979.

Walter S. Turner

WALTER S. TURNER
Chief Assistant Attorney General
64 N. Union
Montgomery, Alabama

Sworn to and subscribed before me the undersigned, this the 18th day of May, 1979.

Cynthia F. Sherman

Cynthia F. Sherman
Notary Public

APPENDIX A

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

IN THE UNITED STATES DISTRICT CO RT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

RICHARD D. ZUCK, Petitioner	]	
—Vs—	]	
	]	NO. CA. 77-A-0207-S
STATE OF ALABAMA, Respondent	]	

JUDGMENT

In accord with the report and recommendation of the magistrate heretofore filed, objections thereto having been considered, it is

ORDERED, ADJUDGED and DECREED that the petition for habeas corpus be and it hereby is DENIED.

DONE, this 13th day of April, 1978.

C. H. ALLGOOD
UNITED STATES DISTRICT JUDGE

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Richard ZUCK, Petitioner-Appellant,

v.

STATE OF ALABAMA,

Respondent-Appellee.

No. 78-3095.

United States Court of Appeals,

Jan. 24, 1979.

State prisoner sought federal habeas corpus relief. The United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., denied relief, and petitioner appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) where retained law firm which served as counsel to petitioner in murder trial also represented state prosecutor in unrelated civil matter there was an actual conflict of interest and such conflict rendered the trial fundamentally unfair absent waiver of right to conflict-free representation, and (2) that a witness apparently informed defendant that his attorneys were also representing the prosecutor did not establish waiver of right to conflict-free representation absent showing that defendant was aware of consequences of proceeding to trial with such counsel or that he knew that he had a right to have other counsel.

Reversed and remanded.

1. Criminal Law —641.5

When dual representation of defendant and another participant in a criminal trial creates a conflict of interest the trial is fundamentally unfair. U.S.C.A. Const. Amends. 6, 14.

2. Criminal Law —641.13(8)

Ineffective assistance of counsel claims involving retained counsel must, in some cases, be examined differently

from those cases involving appointed counsel. U.S.C.A.Const. Amends. 6, 14.

3. Criminal Law —268.1(6)

Since a defense attorney's representation of conflicting interests makes the trial fundamentally unfair, such a trial violates due process and no other state action need be shown. U.S.C.A.Const. Amends. 6, 14.

4. Criminal Law —641.5

A conflict of interest must be actual rather than speculative before the constitutional guarantees of effective assistance of counsel are implicated. U.S.C.A.Const. Amends. 6, 14.

5. Criminal Law —641.5

If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, an actual conflict exists; interests of the other client and defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. U.S.C.A.Const. Amends. 6, 14.

6. Criminal Law —641.5

If an actual conflict exists in representation of defendant and another, it need not be shown that the divided loyalties actually prejudiced defendant in the conduct of his trial. U.S.C.A.Const. Amends. 6, 14.

7. Criminal Law —641.5

Where law firm which had been retained to represent defendant in murder trial also represented prosecuting attorney in an unrelated civil matter, an actual conflict of interest existed and such conflict rendered trial fundamentally unfair, absent waiver; it was sufficient to establish a constitutional violation that defense attorneys owed a duty to defendant to endeavor to refute prosecutor's arguments and to impeach his witnesses regardless of prosecutor's motives. U.S.C.A. Const. Amends. 6, 14.

8. Criminal Law —641.5

Motives of attorneys who are involved in an actual conflict in representation are irrelevant; fact that a particular lawyer might actually resist temptation to dampen ardor of his defense in order to placate another client is of no moment in resolving a conflict of interest situation. U.S.C.A. Const. Amends. 6, 14.

9. Criminal Law —641.5

Judicial analysis in conflict of interest cases does not focus on actual effect of the conflict on a particular defendant's case but, rather, revolves around judicial belief that the Sixth Amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. U.S.C.A.Const. Amends. 6, 14.

10. Criminal Law —641.13(1)

Right to effective assistance of counsel is so vital to a fair trial that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny. U.S.C.A.Const. Amends. 6, 14.

11. Criminal Law —641.5

Mere existence of a temptation in the abstract is sufficient to preclude duality of representation; a defense attorney must be free to use all his skills to provide the best possible defense for his client. U.S.C.A.Const. Amends. 6, 14.

12. Criminal Law —641.4(1)

A defendant can waive his right to effective assistance of counsel; however, a waiver is valid only if it is knowingly and intelligently made. U.S.C.A.Const. Amends. 6, 14.

13. Criminal Law —641.5

For waiver of right to conflict-free counsel to be knowing and intelligent, the state must show that defendant was aware that a conflict of interest existed, realized the consequences to his defense that continuing with counsel under the onus

of a conflict could have, and was aware of his right to obtain other counsel. U.S.C.A.Const. Amends. 6, 14.

14. Criminal Law —641.9

While a state is not bound to follow principles applicable in federal trials in determining waiver of conflict-free representation, if the record is silent on whether the defendant received the information required in the federal situation, the state must bear the burden of showing that the waiver was knowing and intelligent. U.S.C.A.Const. Amends. 6, 14.

15. Criminal Law —541.5

Fact that defendant did not seek change of counsel after witness allegedly informed him that his attorneys were also representing the prosecutor did not establish a waiver of conflict-free representation, absent allegation that defendant was aware of consequences of proceeding to trial with such counsel or that he knew that he had a right to other counsel. U.S.C.A.Const. Amends. 6, 14.

Appeal from the United States District Court for the Northern District of Alabama.

Before GOLDBERG, SIMPSON and CLARK, Circuit Judges.

CHARLES CLARK, Circuit Judge:

An Alabama jury found Richard Zuck guilty of second degree murder and sentenced him to a prison term of forty years.[1] Zuck appeals the denial of his federal habeas corpus petition. Because we find that Zuck's trial counsel had an unwaived conflicting interest which prevented constitutionally adequate representation, we reverse the district court's denial

[1]Zuck appealed his conviction and it was affirmed. **Zuck v. State**, 57 Ala.App. 15, 325 So.2d 531 (1975), **cert. denied**, 295 Ala. 430, 325 So.2d 539 (1976). Zuck later filed a petition for writ of error coram nobis, alleging substantially the same grounds of error that were the subject of his federal habeas petition. The State trial judge denied the petition, and the Alabama Court of Criminal Appeals affirmed.

of habeas corpus relief.

I CONFLICT

The law firm which served as counsel to Zuck in his murder trial also represented, in an unrelated civil matter, the State prosecutor who tried Zuck. The State judge, the prosecutor, and Zuck's attorneys knew of this dual representation, but none of them informed Zuck of it. Zuck urges that the conflict of interest arising from his lawyers' representation of the prosecutor denied him the effective assistance of counsel in violation of the fourteenth amendment to the Constitution.

[1] We have previously examined the requirements of the fourteenth amendment in situations in which the division of an attorney's loyalties creates a conflict of interest. *E.g.*, *United States v. Alvarez*, 580 F.2d 1251 (1978); *United States v. Mahar*, 550 F.2d 1005 (5th Cir. 1977); *Gravitt v. United States*, 523 F.2d 1211 (5th Cir. 1975); *Castillo v. Estelle*, 104 F.2d 1243 (5th Cir. 1974); *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962). These decisions establish that when the dual representation of the defendant and another participant in a criminal trial creates a conflict of interest, the trial is fundamentally unfair as a matter of law. For example, in *Castillo v. Estelle, supra*, the defendant's attorney was simultaneously representing, in an unrelated matter, one of the principal witnesses for the prosecution. The trial judge knew of the conflict of interest, and yet neither the judge nor the defense attorney informed the defendant of the dual representation. The court held that, as a matter of law, the conflict denied the defense effective representation, reasoning that the defense attorney might not have been vigorous enough in his cross-examination of the witness who was also his client.

[2,3] *Castillo* involved an appointed defense attorney, while Zuck's attorney was retained by him. This court has

before indicated that ineffective assistance of counsel claims involving retained counsel must, in some cases, be examined differently from those cases involving appointed counsel. *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir. 1975) (en banc). When a claim of ineffective assistance of retained counsel is based solely on the sixth amendment, "it must be shown that some responsible state official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused." *Id* at 1337. When the facts show that "a lawyer's ineffectiveness has rendered a trial fundamentally unfair, whether he be retained or appointed and whether his action or inaction was known or unknown to state trial officials, a deprivation of Fourteenth Amendment due process results from enforcement of the resultant judgment." *Id.* at 1336. Since a defense attorney's representation of conflicting interests makes the trial fundamentally unfair, such a trial violates due process and no other state action need be shown. *United States v. Alvarez*, 580 F.2d at 1256 (5th Cir. Sept. 28, 1978); *Fitzgerald, supra*, at 1336 n. 2. In any event, in Zuck's case the duality of representation was known both to the trial judge and the prosecutor.

[4-6] A conflict of interest must be actual rather than speculative before the constitutional guarantees of effective assistance of counsel are implicated, *Alvarez, supra*, at 1254. An actual conflict of interest occurs when a defense attorney places himself in a situation "inherently conducive to divided loyalties." *Castillo, supra*, 504 F.2d at 1245. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

If such an actual conflict exists, it need not be shown that the divided loyalties actually prejudiced the defendant in the conduct of his trial. As we noted in *Castillo*, 504 F.2d at 1245:

> When there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record, capable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice.

[7] The state asserts that no conflict of interest existed here because the real party in interest in Zuck's case was the people of the State of Alabama and the prosecutor's only interest was in achieving justice, not in convicting Zuck. Thus, they say the defense attorney's representation of the prosecutor created no conflict with their commitment to defend Zuck. We reject this argument. The dual representation here created an actual conflict of interest. The prosecutor and the defense attorneys here were adversaries for the purpose of this trial. It is sufficient to establish a constitutional violation that the defense attorneys owed a duty to Zuck to endeavor to refute the prosecutor's arguments and to impeach his witnesses. This being of the same concern which underlays *Castillo* is also present here: the defense attorneys were subject to the encumbrance that the prosecutor might take unbrage at a vigorous defense of Zuck and dispense with the services of their firm. Indeed, the potential prejudice arising from the conflict here is even greater than that found in *Castillo*, in which the danger of ineffective representation was limited to the cross-examination of a single prosecution witness. Here, the conflict could conceivably have

infected the entire trial.

[8-11] We do not take issue with the State's characterization of the prosecutor's motives. Under our decisions, the motives of even the attorneys who are involved in an actual conflict in representation are irrelevant. Our analysis of conflict of interest cases does not focus on the actual effect of the conflict of a particular defendant's case. Rather, the basis of these decisions is our belief that the sixth amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. The fact that a particular lawyer may actually resist that temptation is of no moment. The right to effective assistance of counsel is so vital to a fair trial that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny. Determining whether a particular attorney has yielded to the temptation a conflict presents requires a searching analysis of his performance at trial. A cold, dispassionate appellate transcript simply cannot provide an adequate basis for assessing such a performance, for subtle variations in demeanor and depth of cross-examination cannot be reflected in the pages of a transcript. For this reason, the mere existence of a temptation in the abstract is sufficient to preclude duality of representation. A defense attorney must be free to use all his skills to provide the best possible defense for his client. Despite the noblest of intentions, the defense attorneys here may have been tempted to be less zealous than they should have been in the presentation of Zuck's case. This possibility is sufficient to constitute an actual conflict of interest as a matter of law.

II. WAIVER

During the hearing on Zuck's petition for writ of error coram nobis in State court, a witness testified that prior to his trial she had informed Zuck that his attorneys were also

representing the prosecutor. The State contends that Zuck waived his right to effective assistance of counsel since he proceeded to trial knowing of the conflict of interest.

[12,13] While it is true that a defendant can waive his right to effective assistance of counsel, a waiver is valid only if it is knowingly and intelligently made. *United States v. Alvarez*, at 1259-60; *Gray v. Estelle*, 574 F.2d 209, 213 (5th Cir. 1978); *United States v. Garcia*, 517 F.2d 272, 276 (5th Cir. 1975). In order for a waiver of the right to conflict-free counsel to be knowing and intleligent, the State must show that the defendant (1) was aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and (3) was aware of his right to obtain other counsel. *Garcia, supra*, 517 F.2d at 278.

[14,15] In *Garcia*, we held that a federal district court must affirmatively participate in the waiver decision in order for the waiver to be valid, and we set down procedures for the district court to follow in eliciting a waiver. In a federal formum, *Garcia* requires the district judge to inform the defendant of his rights and of the effect of the waiver. The judge must also ascertain whether the defendant comprehends the information given him. *Garcia, supra*, 517 F.2d at 278.

While the State court is not bound to follow the procedures set out in *Garcia*, if the record is silent on whether the defendant received the information required by *Garcia*, then the State must bear the burden of showing that the waiver was knowing and intelligent. *Potts v. Estelle*, 529 F.2d 450, 455 (5th Cir. 1976); *Ford v. Wainwright*, 526 F.2d 919, 921-22 (5th Cir. 1976). Without deciding whether it would be constitutionally sufficient for the defendant to have acquired the requisite waiver information from sources other than the judge, the information Zuck was said to have received clearly

could not establish a constitutional waiver. The witness testified merely that she told Zuck that his lawyers were also representing the prosecutor. The State did not allege that Zuck was aware of the consequences of proceeding to trial with these attorneys or that he knew that he had a right to have other counsel. The State therefore failed to bear its burden of proving that Zuck waived his right to effective assistance of counsel.

III. CONCLUSION

Since we hold that the conflict of interest under which Zuck's attorneys were operating made his trial fundamentally unfair, we need not reach his other assignment of error. The judgment denying habeas corpus relief is reversed and the cause is remanded for entry of an appropriate judgment consistent with this opinion.

REVERSED and REMANDED.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals, attached in the appendix of Petition for Writ of Certiorari, was filed by petitioner.

QUESTION PRESENTED

1. Whether this Honorable Court should review a holding by the Fifth Circuit Court of Appeals that an inherent conflict of interest situation existed based on the following:

1. Retained law firm as counsel to petitioner in murder trial also represented State Prosecutor in unrelated civil matter.

2. The State Judge, the Prosecutor, and Respondent's attorneys knew of this dual representation, none of them informed Respondent of it.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case as being substantially correct.

ARGUMENT AGAINST GRANTING WRIT

Petitioner's first argument is the effect of the decision of the Fifth Circuit Court of Appeals will be to diminish the prosecutor's freedom to employ counsel of choice. Respondent contends the effect does not in any manner infringe on the important area of free choice but simply means the attorney representing an adverse party must disclose such fact so that the accused can choose the proper course under the circumstances.

We live in a day in which many have witnessed eroding confidence in the legal profession. Our system of criminal justice should guarantee that an accused charged with a felony should be entitled to have complete and unreserved confidence in his advocate as opposed to the interests of the prosecutor or the state; and if there is some connection between his advocate and the prosecutor or state, however slight or of whatever nature, he should be given the benefit of knowing the nature of that relationship so that he can make an independent judgment on what course he should follow under the circumstances. In essence, an accused should not be placed in a position where his advocate could in any manner be subject to or influenced by the one whose duty is to present evidence to a jury and request a conviction, the result of which may be incarceration in the state penal system, or death. Ultimately, by requiring full disclosure, the foundation of the legal profession and the criminal justice system will be strengthened.

The second argument made by petitioner is that an accused has the burden of showing prejudice, even assuming his advocate is engaged in a conflict of interest. In response to this argument, the Respondent points out the long established principle enunciated in many federal cases, cited in *Zuck v. Alabama*, 78-2095, January 24, 1979, which holds the issue of prejudice is relevant in an inherent conflict of interest situation. This position was very adequately summarized by the Court in the case of *Castillo v. Estelle*, 504 F2d 1243 (1974), as follows:

> "Where there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude defection on review. A reviewing court deals with a cold record, incapable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, therefore, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice."

These decisions are based on sound reason since it is impossible to penetrate the mind of any human being to determine what motive prompted him to act or react in a certain situation; to cast the burden upon an accused to show prejudice or improper motive when the conflict is inherent as in this case would amount to an intolerable burden and incapable of proof. As stated by the court in *Castillo v. Estelle*, Supra,

> "We do not ascribe to the attorney nor the judge improper motives, but they are chargeable with an error of judgment fatal to a fair trial."

Also, as stated by the Court in *U.S. v. Meyers*, 253 Fed. Supp. 55 (1966),

> "We hasten to add that we are not ascribing to the attorney involved in anything but the highest motives nor are we saying that the defendant was necessarily prejudiced. We do say, however, that it was certainly an error of

> judgment not to have informed the accused of these other clients so that he would have had an opportunity to decide whether he wanted to continue to retain him under the circumstances."

In summary, Respondent contends the decision of the Court reaffirms the importance of providing adequate constitutional safeguards to the rights of the accused in a criminal proceeding. Respondent's advocate at the time of trial had divided loyalties; it is generally recognized that a prosecutor is an advocate, therefore, an adverse party whose interest is opposed to the interest of the accused, *Coolidge v. New Hampshire*, 91 S. Ct. 2022, 403 U.S. 443 (1971) and *Redmon v. State*, 47 Al. App. 421 (1971).

CONCLUSION

For these reasons the Writ for Certiorari should be denied.

Respectfully Submitted,

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Gadsden, Alabama 35901

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama Etowah County

I, the undersigned, Hubert L. Taylor, 827 Chestnut Street, Gadsden, Alabama 35901, hereby certify that I have deposited for service three (3) printed copies of a Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to Walter S. Turner, Chief Assistant Attorney General, 64 N. Union, Montgomery, Alabama 36130, and forty printed copies to the Clerk of the Supreme Court of the United States.

This the ____ day of June, 1979.

HUBERT L. TAYLOR
ATTORNEY FOR RESPONDENT

827 Chestnut Street
Gadsden, Alabama 35901